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No. 03-1206

Supreme Court, U.S.
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In The

Supreme Court of the United States

HENRY H. CUNNINGHAM,

Petitioner,

v.

ROBERT R. PEREZ,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

Does a police officer violate a father's constitutional right to due process when the officer uses coercive interview tactics with the father's children to extract false allegations of sexual abuse?

Does a police officer violate a father's constitutional right to due process when the officer conceals his use of the coercive interview tactics from prosecutors?

II. LIST OF PARTIES TO THE PROCEEDINGS

The parties to the proceedings are:

Henry H. Cunningham, an individual; and

Robert R. Perez, an individual, formerly a police officer with the City of Wenatchee.

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MISCELLANEOUS

F. SINK & G. GRAEF. In the Courtroom or the Clinic: Intervention Problems and Solutions with Child Sexual Abuse (paper presented at 62nd Annual Meeting of American Orthopsychiatric Association, April 1985 by Fances Sink, Ph.D., Harvard Medical School instructor in child development and psychopathy)..... 4

V. CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

Cunningham v. City of Wenatchee, 345 F.3d 802 (9th Cir. 2003).

Cunningham v. City of Wenatchee, 214 F.Supp.2d 1103 (E.D. Wash. 2002).

VI. STATEMENT OF JURISDICTION

The Respondent agrees with Petitioner's Statement of Jurisdiction set forth in the Petition for Writ of Certiorari.

VII. CONSTITUTIONAL AND STATUTORY PROVISIONS

The Respondent agrees with Petitioner's Constitutional and Statutory Provisions.

VIII. STATEMENT OF THE CASE

A. PETITIONER CUNNINGHAM VOLUNTARILY CONFESSES TO SEXUALLY ABUSING HIS DAUGHTERS.

On June 3, 1994, Henry Cunningham voluntarily confessed to sexually abusing each of his four daughters. He signed his typed confession statement and as a result was arrested for child rape and sexual abuse. On August 15, 1994, Cunningham acknowledged that he was guilty 23 times when asked by the criminal trial court judge how he was pleading to the allegations of sexually abusing his daughters. The court accepted his plea of guilty. The Petitioner does not challenge the legality or voluntariness of his confession in his petition for writ of certiorari.

B. INTERVIEW OF THE CUNNINGHAM DAUGHTERS.

Jessika Cunningham was placed in a mental health facility identified as Pine Crest Hospital by her parents. Preceding Cunningham's confession was a referral from Jessika Cunningham's counselor at the Pine Crest facility made to Child Protective Services reporting that she disclosed having been sexually abused by her father. The referral of Jessika Cunningham's disclosure was forwarded by CPS to the Wenatchee Police Department. On June 9, 1994, Jessika Cunningham was interviewed by Detective Robert Perez and CPS caseworker, Dean Rieman, at the Pine Crest Hospital. During this interview, Jessika related numerous incidences of sexual abuse perpetrated by her father.

On June 10, 1994, Detective Perez of the Wenatchee Police Department interviewed Cunningham's daughters, Jennifer and Sarah Cunningham, who also disclosed that they had been sexually abused by their father. This interview took place at the Wenatchee Police Department.

To date, each of Cunningham's daughters steadfastly maintain that they were victimized by their father's sexual abuse.

C. PROCEDURAL HISTORY/OPINIONS BELOW.

The Petitioner filed his civil lawsuit in the Federal District Court for the Western District of Washington. The court changed venue to the Federal District Court for the Eastern District of Washington. Cunningham alleged violations of 42 U.S.C. § 1983 and numerous state law claims.

Respondent Robert Perez filed a motion for summary judgment requesting the district court to dismiss the § 1983 claims against him on the basis that either no constitutional violation occurred or alternatively that he was entitled to qualified immunity. The district court denied Detective Perez's motion, whereupon, he immediately appealed to the Ninth Circuit Court of Appeals.

In October of 2003, the Ninth Circuit reversed the District Court and ruled that Detective Perez was entitled to dismissal of all civil rights allegations levied by Petitioner Cunningham. The court also ruled that Cunningham's confession was voluntary and provided probable cause for his arrest.

The Petitioner requests review by this Court pursuant to his petition for writ of certiorari.

IX. ARGUMENT

A. THE *DEVEREAUX* TEST SHOULD NOT BE CHANGED.

For the first time, Petitioner argues that the deliberate fabrication of evidence standard articulated in *Devereaux v. Abbey*, 263 F.3d 1070, 1075-76 (9th Cir. 2001) (en banc) should be done away with in favor of the standard utilized in pre-trial identification lineups. Petition at 18. In support of this contention, Cunningham asserts that the *Devereaux* decision is in conflict with decisions in other circuits. *Id.* Petitioner is incorrect.

It is important for the Court to review the evolution of how the *Devereaux* standard developed. The Eighth Circuit Court of Appeals in *Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987), dealt with a factually similar case wherein

law enforcement officers were investigating allegations of children who claimed they had been sexually abused. When the criminal case was dismissed, the plaintiffs in *Myers* contended that the officers, in seeking arrest warrants, swearing to complaints and arresting the plaintiffs had deceived judicial officers who found probable cause. *Id.* at 1454. While ultimately granting the officers qualified immunity, the court recognized that investigating child sex abuse allegations involved a "grey" area in investigative procedure based in part on the reluctance of victims of sexual abuse to acknowledge that it has occurred. *Id.* at 1459.

Specifically, the *Myers* Court noted:

> **The uncertainty surrounding acceptable investigative techniques for suspected child sexual abuse derives in part from the unique reluctance of victims of this crime to acknowledge that it has occurred. The record contains materials documenting the reluctance of juvenile sexual abuse and incest victims to disclose the experience. *See, e.g.,* F. SINK & G. GRAEF. In the Courtroom or the Clinic: Intervention Problems and Solutions with Child Sexual Abuse (paper presented at 62nd Annual Meeting of American Orthopsychiatric Association, April 1985 by Fances Sink, Ph.D., Harvard Medical School instructor in child development and psychopathy):**
>
> > **In the clinical setting, a child's reluctance to disclose sexual abuse and seek help or redress is viewed as a reaction *commonly* associated**

> **with abuse ... Children consciously and unconsciously deny memories of their abuse. In some cases, the child's fear of retaliation if they disclose is so strong that they force themselves to pretend and not let on to anyone that the abuse occurred, even with direct questioning. Additionally, the painful feelings associated with the abuse, cannot be tolerated by the child and must be repressed along with memories of the events ... *Id.* When disclosure becomes possible, it takes place in a partial, halting fashion; approaching the threatening material and backing away, revealing abuse, then denying it. This process has been called the "No – Maybe – Sometimes – Yes – " syndrome. *Id.* at 1459-60.**

Finally, the Eighth Circuit in *Myers* noted that "In working with child sex abuse, it is not unusual for children to initially deny being abused." *Id.*

Essentially, the *Myers* court grappled with the issue of child interview techniques and judicial deception to determine if a constitutional violation occurred. The *Myers* court ultimately concluded that flawed interrogation techniques of children without more, did not deprive the investigators of qualified immunity. 810 F.2d at 1460.

In *Snell v. Tunell*, 920 F.2d 673 (10th Cir. 1990), the court dealt with the analysis of civil rights allegations resulting from a child sexual abuse investigation. There, the Tenth Circuit cited the *Myers* decision extensively when analyzing application of qualified immunity to the

allegations of a Fourth Amendment violation. *Id.* at 698. The *Snell* court elaborated on *Myers* and applied the test enunciated by this Court in *Franks v. Delaware*, 438 U.S. 154, 171 (1978), holding that qualified immunity does not provide protection if the plaintiff can make a substantial showing of deliberate falsehood or reckless disregard for the truth, that would be needed to challenge the presumed validity of an affidavit supporting a search warrant. *Snell*, 920 F.2d at 698 citing *Franks v. Delaware*, 438 U.S. 154, 171 (1978) and *Myers*, 810 F.2d at 1457-58.

From this framework of legal analysis dealing with child sex abuse investigations, the *Devereaux* court was presented with allegations that Detective Perez violated the plaintiff's civil rights while investigating complaints that Devereaux sexually abused young girls in his foster home. Detective Perez sought dismissal of the claim pursuant to qualified immunity.

The *Devereaux* court correctly applied the two step process for analyzing qualified immunity set forth by this Court in *Saucier v. Katz*, 533 U.S. 194, 201-04 (2001). The Ninth Circuit after considering all of the allegations in the light most favorable to the plaintiff made it clear that "there is no constitutional due process right to have child witnesses in a child sex abuse investigation interviewed in a particular manner or have the investigation carried out in a particular way. Interviewers . . . must be given some latitude in determining when to credit witnesses' denials and when to discount them . . . Consequently, mere allegations that defendants used interviewing techniques that were in some sense improper, . . . without more, cannot serve as a basis for a claim under § 1983." *Devereaux*, 263 F.3d at 1075.

In completing its analysis, the *Devereaux* court also held, however, that there is a clearly established due process right not to be subjected to criminal charges on the basis of false evidence deliberately fabricated by the government. *Id.* at 1074. The *Devereaux* court therefore developed a test in the context of a child sexual abuse investigation wherein a plaintiff may prevail for a flawed investigation under § 1983 by proving either: (1) the defendants continued their investigation although they knew or should have known that the accused was innocent, or (2) that the defendants used investigative techniques that were so coercive and abusive that they knew or should have known that the techniques would yield false evidence. *Id.* at 1076.

The Petitioner's claim that the above-enumerated test is too stringent is without merit because it essentially does nothing more than unify into one test the protections afforded by the Constitution to be free from deliberately fabricated evidence; as well as protecting due process rights if the investigation techniques while interviewing a child are so coercive that the investigator knew or should have known that it would yield false evidence. In fact, eight of the nine justices in the *Devereaux* decision concurred that there was nothing wrong with the test which was applied in the Petitioner's case at the lower court level. See generally, *Devereaux v. Abbey*, 263 F.3d 1070 (9th Cir. 2001) (en banc).

In other words, the *Devereaux* court scrutinized the examples provided by the plaintiff in that case, and determined what would not support a deliberate fabrication of evidence claim, including the following:

(1) Failing to follow guidelines or to carry out an investigation in a manner that will ensure an error-free result is one thing; intentionally fabricating evidence is quite another other. *Id.* at 1076-77.

(2) Interviewers of child witnesses of suspected sexual abuse must be permitted to exercise some discretion in deciding when to accept initial denials at face value and when to reject them (or withhold judgment on them) and proceed further. *Id.* at 1077.

(3) An allegation that an interviewer disbelieved an initial denial and continued with aggressive questioning of a child cannot, without more, support a deliberate fabrication of evidence claim even if the allegation is amply supported by the evidence. *Id.* at 1077.

(4) Repeated admonitions to be truthful made to a child by an interviewer do not amount to a constitutional violation for deliberate fabrication of evidence, in the absence of any independent allegations or evidence, the interviewer knew or should have known the alleged perpetrator was innocent or the child had already told the truth when making an initial denial of abuse. *Id.* at 1077.

(5) Allegations that an interviewer held an "animus and preconception" against a perpetrator, which lead to the intentional manipulation of child witnesses, are insufficient to establish a constitutional violation when it is plausible that the interviewer held a good faith belief that . . . [the alleged perpetrator] was guilty, which could lead to aggressive or manipulative questioning of the child witness in order to get them to testify truthfully, if reluctantly, to his guilt. *Id.* at 1078.

(6) Unsuccessful use of coercive techniques, such as threatening a child with criminal charges if the child does not change her recantation of abuse, which do not yield any false testimony even though . . . applied to an especially vulnerable witness . . . can hardly serve as a basis for a claim of deliberate fabrication of evidence. *Id.*

(7) Truthfully informing a witness about another witness' corroboration is not such an inherently coercive technique that . . . [the interviewer] knew or should have known would lead to false information . . . [the interviewer] could have reasonably believed that by taking [the child's] side, so to speak, would gain trust and persuade the child to describe what sort of abuse had really taken place. *Id.* at 1079.

Using a confession does not amount to the use of investigative techniques that were so coercive or abusive that the interviewer knew or should have known that such would yield false information. *Id.* at 1079.

(8) Driving a child around the community and asking where the crimes that the child allegedly witnessed took place is surely not such a coercive and abusive technique that . . . [an interviewer] should have known that it would lead to false information. *Id.*

Hence, it is obvious that the Petitioner's complaint about the *Devereaux* deliberate fabrication of evidence test, is based primarily on the complete lack of evidence presented to persuade the lower court that his due process rights were violated. The Petitioner's argument that the *Devereaux* test conflicts with decisions in other circuits is meritless. As pointed out, any individual's due process rights are scrutinized by a court to verify whether information that was used against that person in a criminal

proceeding was either deliberately fabricated or was obtained in a coercive manner crossing the line into a due process violation.

The cases cited by the Petitioner, *Clanton v. Cooper*, 129 F.3d 1147 (10th Cir. 1997) and *Michaels v. New Jersey*, 222 F.3d 118 (3rd Cir. 2000), *cert. denied*, 531 U.S. 118 (2001), are essentially in accord with the *Devereaux* test although neither case articulated the exact language of the *Devereaux* test. Nevertheless, the court in each case scrutinized the statements utilized to determine if they were either deliberately fabricated or extracted from the provider in a manner that was so coercive that it violated the due process rights protected under the Fourteenth Amendment. If either of these two scenarios were satisfied, the plaintiff would be able to avoid summary judgment dismissal based on qualified immunity.

Accordingly, the *Devereaux* test for analyzing child sex abuse investigation does in actuality take into account the "totality of the circumstances" of how the evidence was obtained. If the evidence violates the due process rights of the claimant, qualified immunity is denied and remedies available under 42 U.S.C. § 1983 survive.

B. THE NINTH CIRCUIT PROPERLY ANALYZED PETITIONER'S EXCULPATORY EVIDENCE CLAIM.

Once again, for first time, Cunningham argues that the Ninth Circuit should have applied the test articulated in *California v. Trombetta*, 467 U.S. 479, 488-89 (1984) as opposed to applying the "bad faith" standard set forth in *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). Petition at 26-29. Under either test, the lower court properly determined

that Cunningham failed to allege specific non-conclusory facts to survive summary judgment dismissal.

Initially, it should be pointed out that Cunningham failed to argue, cite, or brief the *Trombetta* decision for the Ninth Circuit. Despite the omission the court nevertheless considered and analyzed *Trombetta* and ruled that Cunningham failed to submit satisfactory evidence to survive summary judgment dismissal. See *Cunningham v. Perez*, 345 F.3d 802, 812 (9th Cir. 2003).

In reality, Cunningham failed to present evidence of bad faith on the part of Detective Perez for not preserving what may or may not have been exculpatory evidence. Moreover, as far as the allegation that Detective Perez failed to document interrogations and did not keep a record of Jennifer and Sara Cunningham's initial denials of abuse, there is no constitutional requirement that a police officer preserve field notes. See *California v. Trombetta*, 467 U.S. 479, 488-89 (1984). (California's policy of not preserving breath samples held not to constitute a constitutional defect because the Constitution imposed only a duty on the State to preserve evidence which both possesses an exculpatory value that was apparent before the evidence was destroyed and was of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.) The Ninth Circuit was correct in pointing out that Cunningham failed to show that any information contained in the notes was not also provided in the police reports or that any alleged omitted information was, indeed, exculpatory. Accordingly, Petitioner's dissatisfaction with the lower court's ruling is not sufficient for this Court to grant his petition for writ of certiorari.

X. CONCLUSION

The *Devereaux* standard establishes adequate protections for children who have been sexually abused as well as protecting the due process rights of persons being accused. The methodology in obtaining disclosures from these children under the *Devereaux* standard is scrutinized under a totality of the circumstances analysis, and, if false or coerced evidence violates a plaintiff's due process rights, his remedies lie in a claim pursuant to 42 U.S.C. § 1983.

Additionally, Petitioner has failed to persuade this Court to grant a writ of certiorari to upset the Ninth Circuit's decision and Respondent respectfully requests this Court to deny the same.

Respectfully submitted,

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